

The Unconstitutional Holiday: Bosnian Constitutional Court annuls Serb Republic Day

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The anniversary of the Battle of the Golden Spurs is the national holiday of the Flemish Community. The battle took place in 1302 and was part of the Franco-Flemish war. In the cruel battle, several thousand French noblemen were killed, including their leader Robert II of Artois. He begged for his life when surrounded, but Flemish soldiers refused, because they “[did not understand French.](#)” Although [historical studies](#) defy such simplistic readings, the battle became a [powerful symbol](#) for the struggle of Dutch-speaking Flemings against French-speaking Walloons.

Let us assume that Belgian French-speakers found the choice of the Flemish national holiday discriminatory and asked for judicial review. Let’s say that the Council of Ministers, presided by the French-speaking Belgian prime minister Charles Michel, took the decree establishing the flag, hymn, coat of arms and holiday of the Flemish Community to the Constitutional Court. Michel could argue that the symbols of the Flemish Community and its holiday violate the principle of equality between Belgians (Art. 10 Constitution) and the principle of loyalty to the Belgian state (Art 143); alone or taken in conjunction with Article 1.1 and 2.(a)(c) of the Convention against Racial Discrimination (ICERD). Imagine as well that a nearly unanimous Flemish parliament has passed a prior resolution declaring that it would not comply with the Court decision. The Court could easily dismiss the claim for lack of temporal jurisdiction. But, for the sake of argument, let’s just assume that the Court found the case admissible and ruled the flag, the hymn, the coat of arms and the community holiday unconstitutional.

Would the Constitutional Court not go beyond the implicit and explicit boundaries of its power? How would the Flemish Community and the people in Flanders react? Would it not be seen as an attack on Flemish identity and autonomy? Would the Court not risk its own reputation and legitimacy by taking a case like to enflame communitarian passions between French and Dutch speakers? Would the rule of law not be the first victim if the decision were not implemented?

Change of location. In 2006, the Constitutional Court of Bosnia-Herzegovina annulled the coat of arms, anthem, family patron saints and church holidays of the Republika Srpska, one of the territorial sub-units in a country with one of the [most complicated political systems in the world](#). The Court annulled the church holidays, because they largely reflected Orthodox religious holidays only ([U-4/04](#)). Excluded from the official holidays were those of the other two main religious denominations, Muslim Bosniaks and Catholic Croats. The Court equally annulled coat of arms and flag of the Federation of Bosnia-Herzegovina, the other territorial sub-unit. The flag of the Republika Srpska survived Court scrutiny, but [two international judges strongly dissented](#). In these decisions, the Court argued that symbols have to reflect the identity, culture and traditions of all three constitutive groups in Bosnia (Bosniaks, Serbs, Croats) without any territorial delimitation.

The Serb Republic implemented the judgment after [considerable delay](#) in 2007, but kept the Day of the Republic as the entity holiday. January 9, the Day of the Republic, is important for Bosnian Serbs for two reasons. First, it is on 9 January 1992 that the Bosnian Serb parliament proclaimed the Bosnian Serb Republic. As widely known, the establishment of the Republic was tainted by brutal policies of ethnic cleansing. Second, Stephan’s day falls on January 9, according to the Julian calendar. The holy Stephan is the patron saint of the Bosnian Serb Republic. The coincidence between a public and a religious holiday begs the questions whether this is a ‘[secular holiday](#)’ or a religious holiday. Bosniacs strongly dissented from that choice, mainly because of the association of the date with the founding of the Serb Republic. Six years later, the Bosniac member of the state presidency called upon the constitutional court to review the constitutionality of the entity holiday.

The lead-up to the judgment

Bakir Izetbegovic, son of wartime leader and former Bosnian president Alija Izetbegovic, submitted a request to the Court to review the constitutionality of the entity holiday (U-3/13). As he is member of the tripartite Bosnian presidency, Izetbegovic has direct access to Court without needing to justify individual and personal interest. Izetbegovic can challenge ‘any provision of the entity law and constitution’[\[i\]](#) for their compliance with the Bosnian Constitution and the European Convention on Human Rights[\[iii\]](#).

Faced with this ‘hot potato’, the Court calls on help from outside. In June 2013, the Court asks the Council of Europe’s Venice Commission for advice. Some months later, the Commission’s [Amicus curiae brief](#) is ready. For the Venice Commission, the entity holiday acts ‘more as a wedge than a joint’ in the multi-cultural society of Bosnia. Read in conjunction with the strong non-discrimination principle of the Bosnian Constitution, the Venice Commission found that the Day of the Republic gives rise to a violation of the European Convention on Human Rights (Protocol 12) and the International Convention against racial discrimination (ICERD).

The Court took a long time to decide the case. The case was pending for nearly three years, not because it was of considerably technical complexity or for reasons of backlog. The Court had a very hard time deciding the case, because it was one of the cases that pitched the judicial versus the political sphere. Already in the case on the flag of the Serb Republic, international judges Constance Grewe (Strasbourg) and David Feldman (Cambridge) needed much ‘heart-searching’ to come to a conclusion (para 4, [separate opinion](#)). At that time, Bosnia’s local judges had agreed on a compromise to keep the Bosnian Serb flag, but annul coat of arms, hymn and religious holidays of the Serb Republic. After nearly three years, the Court was finally ready to decide the case dealing with the Republic Day.

The decision of the Court

The [Court found](#) that a secular holiday, such as the day of the Republic, needed to be a holiday for all the peoples of Bosnia. The Court pointed out that in no way the decision is intended against a particular people or religion. However, in a multi-religious and multicultural society such as Bosnia equality means that equal consideration has to be given to all groups. In light of that, the Republic Day [violated](#) the non-discrimination principles of the Bosnian Constitution, the European Convention on Human Rights and the anti-racism Convention (ICERD). For a more detailed analysis, we need to wait for the publication of the judgment (first in Bosnian/Serbian/Croatian and later in English).

As with prior decisions with a high political impact, the Court was split along ethnic lines. The majority of local judges (the two Bosnian Croat and two Bosnian Serb judges) were outvoted by the two Bosniak judges, joined by the three internationals. As in the previous decision ([U-14/12](#)) on the unconstitutionality of the entity vice-presidencies (follow up judgment to *Sejdic-Finci v. BiH*, and *Zornic v. BiH*), the three international judges decided to follow the case law and opinions of the Council of Europe organs (ECtHR and Venice Commission).

Probably in order not to seem biased, the Court decided on the same day a case against Izetbegovic’s party. On that day (26 November 2015), the Court only took two important decisions. Next to the decision on the Republic Day, the Court [dismissed the challenge](#) of one fourth of the deputies of the Bosnian parliament (mostly from Izetbegovic’s SDA party) against a law that could potentially limit the rights of Bosniak returnees to their pre-war homes in the Bosnian Serb Republic. The Court’s timing to present the Republic Day decision seems taken in light of strategic considerations to preserve its legitimacy for Bosnian Serbs.

Broader relevance

The judgment of the Bosnian Court brings to the fore some interesting topics that resonate well beyond Bosnia. Should the religious and secular holidays in Western countries equally take account of multi-cultural society? There is a considerable [political debate in Italy](#), after the principal of an elementary school in the Milan region has banned Christmas festivities from his school. A group of Belgian intellectuals equally recommended in their [report to the government](#) to cancel all Christian holidays

(except December 25) and let citizens choose which religious holidays to take (just as in Bosnia). Relatedly, Muslim holidays are [observed by public schools](#) in New York for the first time this year. More broadly, should the symbols of our society and the teaching in our schools take account and reflect the super-diversity that increasingly characterizes European states?

Next to considerations about equality, religion and the multi-cultural nature of our societies, the decision is interesting because the Court faced a tension between what is principled and what is possible. While the annulment of the discriminatory entity holiday seems a correct decision in light of domestic case law and Convention law, it brings the Court in a course of collision with strong sub-national authorities. In the wake of the judgment, all Bosnian Serb parties called for [a law on the constitutional court that would get rid of the Court's three international judges](#). If the law will not be approved within the next 120 days, Bosnian Serbs will launch a referendum delegitimizing the constitutional court.

A broader question is whether it is legitimate that three international judges continue to sit on the Bosnian Court and decide hard cases even twenty years after the end of the Bosnian war. I believe there are strong grounds for continuing to have international judges, which however does not elude the question: how transitional should transitional justice and international oversight be in a country that [will apply](#) for EU membership by the end of the year?

[\[i\]](#) (Art. IV3a/Constitution)

[\[ii\]](#) Article II.2: The European Convention on Human Rights applies directly and „has priority over all other law“.

The author thanks Cedric Jenarts and Maja Sahadzic for their valuable comments.

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